

**OPINION
66-217**

October 6, 1966 (OPINION)

Mr. Ralph Dewing

Secretary

Auditing Board

RE: State - Employees - Payment for Vacation

This is in response to your request for an opinion on the following facts:

"An employee of a state department resigned his position on August 31, 1966 with an oral agreement with his employer that he would be paid in September, 1966 for earned vacation time not taken during the time of his employment. His former employer has confirmed this fact. His former employer has submitted a payroll voucher for the month of September, 1966 authorizing payment to his former employee for the earned vacation, as salary during September, 1966. This person was employed by another department of state government during the month of September and received a full month's salary for same."

You then ask, "Is the payroll voucher, authorizing payment to this former employee for earned vacation as salary during September, 1966, a legal expenditure of funds that can be approved by the Auditing Board?"

In the absence of any specific agreement, vacation with or without pay, or pay in lieu of vacation, is a matter dependent upon the policy and understanding had between the employer and employee. Invariably these questions are resolved on the basis of the contract of employment, whether it be written or oral. Where an employer has an understanding or an agreement with his employees in the absence of a specific contract, such understanding or agreement prevails. (For discussion see Volumes 56 and 57 C.J.S.)

As to policy relating to employment and benefits or remuneration resulting therefrom, the state departments for some years had a loose policy - each department to a great degree setting its own policy. In 1965, the Legislature enacted Chapter 378, which has now been codified as section 54-06-14 of the North Dakota Century Code. This section sets forth the terms and conditions of annual leave and sick leave. The first portion of this section provides as follows:

"ANNUAL LEAVE AND SICK LEAVE FOR STATE EMPLOYEES TO BE PROVIDED. Annual leave and sick leave shall be provided for all persons in the permanent employment of this state who are not employed under a written contract of hire setting forth the terms and conditions of their employment, within the limitations, terms and provisions of this section. Annual leave for an employee entitled thereto shall be within a range

of a minimum of one working day per month of employment to a maximum of two working days per month of employment, based on tenure of employment, to be fixed by rules and regulations adopted by the employing unit. * * * ."

It is observed that certain provisions of the Act are mandatory and certain provisions of the Act are left to the discretion of the department head, or the employing unit. The Act specifically provides the minimum or maximum leave that may be allowed but leaves it to the individual departments to set the specific leave allowances within the brackets established by the Legislature. The Act is silent as pertaining to pay in lieu of vacation. Neither does the Act concern itself with the transfer of vacation time where an employee leaves the services of one department and is employed by another department.

It thus appears that the employer and employee can arrange for the employee to receive pay in lieu of vacation. Whether this is a good practice or not, we make no comment. In fact it is possible that such practices could lead to unwarranted abuses and for that reason might not be recommended. Whether such practice should be employed or permitted must be left to the sound discretion of the employing unit or must be resolved by the Legislature.

Vacation is considered in the same light as additional compensation for services rendered and is considered part of the employment contract. (See C.J.S.) In this instance the former employer agreed to pay the employee for the unused earned vacation. Apparently the consideration for this arrangement was that the employee would continue to perform services until the date that he terminated his employment relationship and began his employment with another employing unit. It is our opinion under the facts stated that the payment as proposed by the former employer is a legal expenditure which can be approved by the Auditing Board.

HELGI JOHANNESON

Attorney General